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January 4, 2001

Lois G. Lerner, Esq.
Acting General Counsel
Federal Election Commission
999 E Street, NW - 6th Floor
Washington, DC 20463

Re: MUR 5158

Dear Ms. Lerner:

This letter is the response of Carnahan for U.S. Senate¹ and Rebecca Lambe, as Treasurer (together, "Respondents"), to the complaint in MUR 5158. The complaint is meritless and should be dismissed.

INTRODUCTION

The American Conservative Union asserts that Handgun Control, Inc. and its separate segregated fund (collectively, "Handgun Control") made a series of expenditures that violated the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.* However, the complaint fails to set forth anything that Respondents did to violate the Act. The only basis for Respondents' continued presence in this matter is the complaint's contention that they passively benefited from the alleged expenditures. For this reason alone, the Commission should dismiss Respondents from the complaint.

DISCUSSION

The complaint asserts that Handgun Control, by posting a web site that expressly advocated the defeat of Republican candidate John Ashcroft, made illegal in-kind contributions to Governor Carnahan's campaign. See Compl. at 15-18. Yet

¹ Carnahan for U.S. Senate is the principal campaign committee of Governor Mel Carnahan of Missouri, who died on October 16, 2000

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only "expenditures that are coordinated with a candidate or campaign are considered in-kind contributions." See General Public Political Communications Coordinated With Candidates and Party Committees, 65 Fed. Reg. 76,138 (2000) (citing Buckley v. Valeo, 424 U.S. 1, 46-47 (1976) and FEC v. Christian Coalition, 52 F. Supp. 2d 45, 85 (D.D.C. 1999)). Because the complaint comes nowhere near alleging coordination between Handgun Control and Respondents, there is no reason to believe that Respondents violated the Act.

Ever since the passage of the Act, Congress and the courts have distinguished between those expenditures that are "authorized or requested" by a campaign, which are treated as in-kind contributions; and those that are not, which are treated as independent expenditures. Buckley, 424 U.S. at 46 n.53. The exact nature of this distinction was an open question at the time of this complaint. As the Commission recently wrote: "The statutory terms are not inherently clear, nor does the Act's legislative history provide much guidance." 65 Fed. Reg. at 76,141. New rules that are not yet effective "will fill what is largely a vacuum in this area." Id.

The absence of a clear standard has made the Commission reluctant to take action in other matters that involved far more money and public attention than this one. See, e.g., MURs 4553, 4671, 4713, 4407 and 4544. As the Commission stated in another context, "absent controlling regulations or the authoritative interpretations of the courts, the Commission's enforcement standard [must] be the natural dictate of the language of the statute itself." Statement of Reasons of Commissioners Darryl R. Wold, Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of Dole for President Committee, Inc., et al., at 3 (June 24, 1999).

The most authoritative interpretation that existed at the time of this complaint was Christian Coalition. There, the court held that one must ask whether the spending was "made at the request or the suggestion of the candidate or an authorized agent." Id. at 91. If so, then it may be attributed to the campaign. If not, the spending may only be attributed to the campaign when "the candidate or her agents can exercise control over" it, or when "there has been substantial discussion or negotiation between the campaign and the spender over a communication's: (1) contents; (2) timing; (3) location, mode or intended audience . . . ; or (4) volume'" Id. at 92. The Commission's new rules "generally follow" the Christian Coalition standard. 65 Fed. Reg. at 76,138.

Even if the Commission was inclined to seek enforcement against events that occurred when there was a "vacuum" in the law, 65 Fed. Reg. at 76,141, it would find no violation. There was no coordination between the Carnahan campaign and Handgun Control regarding the communications in question. Indeed, the meager facts offered by the complaint come nowhere near satisfying the Christian Coalition standard. The only fact offered to establish coordination is that the SSF contributed to the candidate. See Compl. at 6. There is nothing in the complaint to suggest that the communications were made at Respondent's request or suggestion, or that there was any discussion at all between Respondents and Handgun Control about them.

Even the American Conservative Union's turgid complaint effectively admits that a contribution alone does not suffice to establish coordination. While it notes that the SSF spent more than \$250,000 on independent expenditure television advertisements against the Republican candidate, see Compl. at 3, it alleges only that the web communications were illegal contributions. At the same time, it challenges the independence of a similar television ad campaign against another Republican candidate. It is obvious that the complaint was intended simply as a shotgun attack against Handgun Control, spraying accusations indiscriminately with no consistent factual or legal basis.

Under the logic of this complaint, the Commission would devote its limited resources into a full-scale investigation every time an organization that contributed to a candidate chooses to engage in independent activities in opposition to his opponent. The Commission has sensibly avoided such action in the past. See, e.g., MUR 4116 (involving a similar complaint filed in 1994 by the American Conservative Union). It should do the same here and dismiss the complaint.²

² The complaint raises even more concerns by specifically seeking to restrict Handgun Control's Internet communications, a subject that the Commission has yet to address specifically through regulation. See Use of the Internet for Campaign Activity, 64 Fed Reg 60,360 (1999). Indeed, the Commission has questioned "whether campaign activity conducted on the Internet should be subject to the Act and the Commission's regulations at all " Id. at 60,361.

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For the foregoing reasons, Respondents respectfully request that the Commission dismiss the complaint.

Very truly yours,



Brian G. Svoboda
Counsel to Respondents

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